STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs No.

JOEZELL WILLIAMS, II,

Defendant-Appellant.

Lower Court No. 02-04374
Court of Appeals No. 246706

ANSWER IN OPPOSITION TO DEFENDANT'S DELAYED APPLICATION FOR LEAVE TO APPEAL

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I.

A prosecutor's conduct warrants reversal only if the claim is preserved and the conduct is prejudicial. Here, defense counsel did not object to the argument that Defendant was a cold-hearted murderer and that his acts were "evil." Since the prosecutor's argument was consistent with the evidence presented at trial and based on the charge of premeditated murder, has Defendant shown a miscarriage of justice?

The People answer: NO
Defendant answers: YES

II.

Both the United States and Michigan Constitutions prohibit multiple punishments where not legislatively authorized. Even if conviction and sentence for both first-degree murder on a theory of felony murder and the predicate felony violates jeopardy, if conviction for first-degree murder is also supported by the alternative theory of premeditation, so that the separate conviction is no longer necessarily predicate, does conviction and sentence for the predicate felony violate jeopardy?

The Court of Appeals answered: YES
The People answer: NO
Defendant answers: YES

III.

A search warrant is required to make a non-exigent entry into a third-party's home to make an arrest, but consent takes the entry outside the rule. The police had the consent of the homeowner to enter a bedroom in the home where defendant was sleeping. Since valid consent was given, no search warrant was required, was Defendant's arrest legal?

The People answer: YES
Defendant answers: NO

COUNTER-STATEMENT OF FACTS

The People accept defendant's statement of facts for purposes of this brief on appeal, with the exception of all improper conclusions and subject to the additions, deletions, and corrections noted below and in the People's argument.

ARGUMENT

I.

A prosecutor's conduct warrants reversal only if the claim is preserved and the conduct is prejudicial. Here, defense counsel did not object to the argument that Defendant was a cold-hearted murderer and that his acts were "evil." Since the prosecutor's argument was consistent with the evidence presented at trial and based on the charge of premeditated murder, Defendant has not shown a miscarriage of justice.

Appellate Standard of Review

The People accept Defendant's statement of the standard of review and add the following:

In analyzing the issue of prosecutorial misconduct, the relevant inquiry is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[1] But appellate review of claims that a prosecutor made improper remarks is generally precluded absent an objection by defense counsel, because a failure to object deprives the trial court of an opportunity to cure the alleged error.[2] Thus, unpreserved claims are reviewed for plain error, and the defendant must show: 1) that error occurred, 2) that was plain or obvious, and 3) that affected his substantial rights, 4) to a degree that a miscarriage of justice resulted. A miscarriage of justice results if an innocent person was likely convicted, or if the error was one that, if countenanced, would seriously affect the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.[3]

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[1] *Donnelly v DeChristoforo*, 416 US 637, 644, 94 SCt 1968, 1971, 40 LEd 2d 431, 437 (1974); *Darden v Wainwright*, 477 US 168, 106 SCt 2464, 91 LEd 2d 144, 157 (1986).

[2] *People v Stanaway,* 446 Mich 643, 687 (1994).

[3] *People v Carines,*, 460 Mich 750 (1999); *People v Schutte,* 240 Mich App 713, 721 (2000).

Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would eliminate the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct.[4]

Discussion

The propriety of the prosecutor's remarks depends upon all the facts of the case. Arguments must be read as a whole and be evaluated in light of the relationship to the evidence properly admitted at trial.[5] It is proper argument for the prosecutor to draw all reasonable inferences from the evidence presented.[6]

Defendant alleges several instances of prosecutorial misconduct. Because none of these allegations were preserved by objection below, appellate review is for plain error.

The defendant in this case was charged with first degree premeditated murder.[7] Therefore, the prosecutor had to prove that Defendant committed the killing with premeditation and deliberation, often referred to as cold-blooded planning so as to distinguish it from the malice element of second degree murder.[8] To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. Premeditation and deliberation

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[4]*People v Launsburry,* 217 Mich App 358, 361 (1996).

[5]*People v Schutte,* 240 Mich App 713, 721 (2000); *People v Johnson*, 187 Mich App 621, 625 (1991).

[6] *People v Davis*, 57 Mich App 505 (1975); *People v Jolly*, 50 Mich App 163 (1974)

[7]MCL 750.316(1)(a); *People v Anderson,* 209 Mich App 527, 537 (1995).

[8]*People v Morrin,* 31 Mich App 301, 329-331 (1971).

characterize a thought process undisturbed by hot blood and while the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a "second look."[9]

At trial, Donald Chapman testified that he, Defendant, and that victim were simply socializing and driving around when Defendant shot the victim. Chapman stated that he heard a loud boom and saw "the whole car light up." After hearing the second shot, Chapman realized that Defendant, the front seat passenger, had a gun and was shooting the victim who was seated in the back seat of the car. Chapman saw Defendant lean over the seat toward the back, heard him tell the victim to lay down, and saw him force the victim's head down on the car seat before shooting him two more times. The only explanation that Defendant gave Chapman to explain his actions was that he had to "survive out here."[10] Defendant took the victim's shoes, wallet, and approximately $70 or $80 off the victim.[11] Later, Defendant demonstrated to his girlfriend, Linda Payne, how he pulled his gun out, turned to the back seat, and shot the victim while the victim was "rolling up some weed."[12]

Calling Defendant a "cold-blooded murderer" and describing his acts as "evil" were not improper remarks under these circumstances. Defendant correctly asserts that a prosecutor should refrain from arguments which simply appeal to the jury's sympathies for the victim or that would

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[9]*People v Plummer*, 229 Mich App 293, 300 (1998).

[10]8/12/02, 211-215.

[11]8/12/02, 216-217, 238; 8/13/02, 69.

[12]8/13/02, 139-141.

divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused.[13] But Defendant mischaracterizes the prosecutor's remarks. On two occasions in Defendant's brief, he quotes portions of the prosecutor's closing argument. A closer review of the record shows that, sandwiched between these quotes were thirteen pages of argument where the prosecutor reviews all of the evidence that proved Defendant's guilt.[14]

The prosecutor in this case had the task of presenting evidence of inexplicable violence to the jury where the facts did not explain why Defendant acted so violently against a person who was apparently his friend. When the prosecutor's closing argument is read in its entirely, the record reveals that the prosecutor's remarks attempted to convey to the jury that acts of extreme violence, while incomprehensible to most people, did in fact occur.

Moreover, the prosecutor argued to the jury that while Defendant's actions appeared sudden, they were nothing less than a "cold-blooded" murder. In fact, the evidence showed that Defendant waited until he caught the victim completely off guard before shooting him multiple times in the head. Therefore, these remarks were proper as they were accurate descriptions based on the evidence and relevant to the charge of first degree premeditated murder.[15]

Placed in context, the prosecutor did not encourage a conviction on the ground that the victim deserved justice[16] nor did he advocate that the jury improperly "suspend its own powers of critical

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[13]*People v Watson,* 245 Mich App 572, 591 (2001); *People v Biondo*, 76 Mich App 155, 159 (1977); *People v Truong (After Remand),* 218 Mich App 325, 340 (1996).

[14]8/19/02, 45-59.

[15]*People v Paquette,* 214 Mich App 336, 342-343 (1995); *People v Hoffman,* 205 Mich App 1, 21-22 (1994).

[16] *People v Abraham,* 256 Mich App 265, 275-276 (2003).

analysis and judgment in deference to those of the police and prosecutor."[17] Rather the prosecutor urged the jury to resolve the case on the basis of reasoned consideration of the evidence.[18]

Furthermore,"The art of advocacy is the art of persuasion...emotional language is an important weapon in counsel's forensic arsenal" limited by ethical considerations.[19] A prosecutor has "great latitude" in making statements and arguments at trial[20] and, while it is his duty to see that the accused receives a fair trial, "it is likewise his duty to use his best endeavor to convict persons guilty of crime, and in the discharge of this duty an active zeal is commendable...."[21] Therefore, since what is involved here is not final summary, but final argument which need not and should not be given in bland terms, the prosecutor should not be faulted for using powerful language to argue her point.[22]

Lastly, even if the prosecutor's remarks were improper, the statement "did not affect the obvious conclusion that a horrible crime had occurred."[23] Because any undue prejudice to Defendant

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[17] *Id.*

[18] *People v Humphreys*, 24 Mich App 411, 418 (1970); also see *People v Hoffman,* 205 Mich App 1, 21 (1994).

[19] *People v Mischley*, 164 Mich App 478, 483 (1987).

[20] *People v Bahoda,* 448 Mich 261, 282 (1995).

[21] *People v Dane*, 59 Mich 550 (1886); see also *People v Guenther*, 188 Mich App 174 (1991).

[22] *People v Fisher,* 449 Mich 441, 452 (1995).

[23] *People v Cooper,* 236 Mich App 643, 652 (1999).

could have been removed by a curative instruction had the defense requested one and due to the overwhelming evidence of Defendant's guilt, a miscarriage of justice did not occur in this case.[24]

[24] *Id; People v Launsburry,* 217 Mich App 358, 361 (1996).

II.

Both the United States and Michigan Constitutions prohibit multiple punishments where not legislatively authorized. Even if conviction and sentence for both first-degree murder on a theory of felony murder and the predicate felony violates jeopardy, if conviction for first degree murder is also supported by the alternative theory of premeditation, so that the separate conviction is no longer necessarily predicate, conviction and sentence for the predicate felony does not violate jeopardy.

Appellate Standard of Review

Because Defendant posed no objection to being sentenced for first degree premeditated murder, first degree felony murder and larceny from a person, review is for plain error. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." Reversal is warranted only when the plain, forfeited error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence or when the plain error resulted in the conviction of an actually innocent person.[25]

Discussion

On March 23, 2005, the People apply for leave to appeal the January 27, 2005 decision of the Court of Appeals which vacated Defendant's conviction of larceny from a person.[26] That application is pending.

The Double Jeopardy Clauses of the United States and Michigan Constitutions safeguard

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[25] *People v Carines*, 460 Mich 750 (1999).

[26] *People v Williams*, 265 Mich App 68 (2005), attached.

against successive prosecutions and multiple punishments for the same offense.[27] In the multiple punishment context, the clauses seek to ensure that the defendant's total punishment will not exceed the scope of punishment provided by the Legislature.[28]

In *People v Nutt*,[29] this Court adopted the *Blockburger*[30] "same elements" test as the test intended by the ratifiers of the 1963 Constitution to be applied for discerning the meaning of the term "same offense" for purposes of successive prosecutions. In *People v Mario Curvan*,[31] scheduled for oral argument before this Court next month, the People argue that for purposes of multiple punishments, "same offense" should be determined by application of the same test as for successive prosecutions, the ultimate focus is not upon whether two statutes proscribe the same offense, but whether the Legislature intended there to be cumulative punishments from both statutes.[32] But in

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[27]US Const., A.m. V; Const. 1963, art. 1, §§ 15.

[28] *People v Denio,* 454 Mich 691, 706 (1997); *People v Sturgis*, 427 Mich 392, 398 (1986).

[29] *People v Nutt,* 469 Mich 565 (2004).

[30] *Blockburger v United States,* 284 US 299, 52 S Ct 180, 76 L Ed 2d 306 (1932).

[31]*People v Curvan,* COA No. 242376, application granted, *People v Curvan.* 471 Mich 914 (2004).

[32] *Ohio v Johnson,* 467 US 493, 498-499, 104 S Ct 2536, 2540, 81 L Ed 2d 425 (1984); *Albernaz v United States,* 450 US 333, 344, 101 S Ct 1137, 1145, 67 L Ed 2d 275 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed"); *Whalen v United States,* 445 US 684, 688, 100 S Ct 1432, 1436, 63 L Ed 2d 715 (1980) ("[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized"); *Brown v Ohio,* 432 US 161, 165, 97 S Ct 2221, 2225, 53 L Ed 2d 187 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments").

determining legislative intent, *Blockburger* is but a test of statutory construction and should only be applied if helpful to ascertaining legislative intent.[33] It is not helpful when applied to predicate and predicate-based offenses.[34] But a resolution of *People v Mario Curvan*[35] adverse to the People will not resolve the problem posed by this case.[36]

In this case, the jury convicted Defendant of both first-degree premeditated murder and first degree felony murder, as well as larceny from the person of another. The trial court entered a single conviction of first-degree murder, based on alternative theories of premeditated murder and felony murder. It sentenced Defendant to one term of life imprisonment and a concurrent sentence for the larceny conviction.

Citing *People v Bigelow,*[37] the Court of Appeals affirmed Defendant's conviction and sentence on one count of first-degree murder based on two theories. But ruling that it was also bound by the second portion of *Bigelow*,[38] the court reluctantly vacated Defendant's conviction and sentence for the predicate felony. In so doing, the Court of Appeals invited this Court to review and modify *Bigelow*.

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[33]*People v Robideau,* 419 Mich 458, 486 (1984); *People v Wakeford,* 418 Mich 95, 107 (1983).

[34]*Whalen, supra*, 445 US at 708-709.

[35]*Supra.*

[36]Though a resolution of *Curvan* consistent with the People's argument would resolve this case.

[37]*People v Bigelow (Amended Opinion),* 229 Mich App 218, 220-221 (1998).

[38]*Bigelow, id*, 229 Mich App at 221-222.

> *Bigelow* blindly extended the double jeopardy analysis from a case involving a conviction only under a felony-murder theory to one where the jury explicitly found both the premeditation theory and the felony-murder theory to apply...a more thoughtful analysis might lead to the conclusion that the conviction for the underlying felony need not be vacated where, as here (and in *Bigelow*), it can be determined with certainty that the jury accepted the premeditation theory (either in addition to or instead of the felony-murder theory).[39]

Indeed, in so far as *Bigelow* relied on *People v Gimotty*[40] for vacating the underlying felony, its reasoning was flawed. The *Gimotty* Court reviewed double jeopardy as it related to convictions of felony murder and the predicate felony only.[41] Since there was no alterative theory upon which the defendant's first-degree murder conviction was based, the *Gimotty* Court ruled in accordance with the prevailing law.[42] Because the jury in *Bigelow* convicted the defendant of both premeditated murder as well as felony murder, *Gimotty* was inapplicable.

As Judge O'Connell, a member of *Bigelow* panel, stated in his dissenting opinion here, double jeopardy is not offended by conviction for premeditated murder and larceny, so that "[[t]o strike the larceny conviction, even at the direction of an analytically deficient precedent, effectively nullifies defendant's conviction and sentence for premeditated murder, notwithstanding the fact that a jury verdict supports the conviction and authorizes the consequent punishment." [43]

Because convictions of premeditate murder and larceny from a person are undoubtably

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[39]*Williams, supra.*

[40]*People v Gimotty*, 216 Mich App 254 (1996).

[41]*Id*, 216 Mich App 259-260.

[42]*People v Passeno*, 195 Mich App 91 (1992); *People v Wilder,* 411 Mich 328, 352 (1981). Ironically, *Passeno,* was overruled by *Bigelow, supra*, 229 Mich App at 221.

[43]*Williams, supra.*

different offenses regardless of the test the reviewing court applies, they do not violate double jeopardy. No further analysis is needed.

For these reasons, *Bigelow's* ruling, as it pertains to predicate felonies, was erroneous and should be modified.

III.

A search warrant is required to make a non-exigent entry into a third-party's home to make an arrest, but consent takes the entry outside the rule. The police had the consent of the homeowner to enter a bedroom in the home where defendant was sleeping. Since valid consent was given, no search warrant was required and defendant's arrest was legal.

Appellate Standard of Review

A trial court's ruling on a motion to suppress evidence is entitled to deference and is not to be disturbed on appeal unless it is clearly erroneous.[44]

Discussion

Defendant complains that the warrantless entry into and search of the room where he was sleeping violated his fourth amendment rights. Defendant contends that the introduction of the gun and residue tests that were acquired as a result of the illegal arrest prevented him from having a fair trial and he should be granted a new trial. The police, however, were legitimately on the premises, having been given permission to be in the home, first by a person with apparent authority and then by the homeowner. Since the police had probable cause to arrest defendant for murder and they were legitimately on the premises, defendant's arrest was legal.

An arrest warrant is required to make a forcible non-exigent entry into a defendant's dwelling.[45] A search warrant is required to make such an entry into a third-party's home, but consent takes the either entry outside the *Payton* rule.[46] The consent exception permits searches and seizures

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[44]*People v Burrell*, 417 Mich 439, 448 (1983).

[45]*Payton v New York*, 445 US 544, 63 L Ed 2d 639, 100 S Ct 1371 (1980); *People v Gary*, 150 Mich App 446,450 (1986).

[46]*People v Carpenter*, 120 Mich App 574 (1982).

when consent is unequivocal and specific, and freely and intelligently given.[47] When the People seek to justify an entry without a warrant by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the consent was given by a third party who had equal possession or control of the premises.[48] The validity of the consent depends upon the totality of the circumstances.[49] In the instant case, there was evidence of consent.

Consent is valid where it is given by a person with apparent or actual authority over the premises.[50] Hill, the woman who gave the initial consent, had apparent authority as she was an adult who came to the door of the home at 3:20 in the morning and allowed the officers into the home after being told their purpose, and Lewis had actual authority because she was the home owner and she not only allowed the officers to stay in her home, but she pointed out the room in which defendant was sleeping. Defendant argues that Lewis had authority to allow the police into the rest of the house but not into defendant's bedroom. The evidence at the hearing, however, failed to show that defendant was anything more than a house guest, and thus, the homeowner, Lewis, had equal access to the bedroom of her house guest. Since Lewis owned the home and had every right to enter the bedroom herself, she could legitimately give consent for the officers to enter the room.

This is not a case where defendant was a co-tenant in the home. He did not pay rent for the room or own half the house. He did not testify that he had any ownership rights or that his sister had relinquished her rights to that room. Even if he stayed in the room several times during the week,

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[47]*People v Jordan,* 187 Mich App 582, 587 (1991).

[48]*Gary, supra,* 150 Mich App at 450.

[49]*Jordan, supra*, 187 Mich App 587.

[50]*People v Davis*, 146 Mich App 537 (1985).

as he contended, that was not the address he gave to the police when he was arrested there. He testified in fact that he stays in several different homes each week.[51] Thus, since the home was owned by Lewis, and defendant did not have exclusive rights to the room where he was sleeping that night, Lewis had the actual authority to allow the police to search every room in her home and she did.

Defendant cites *People v Mullaney*[52] to support his claim that his sister did not have authority to allow the police into his bedroom. *Mullaney* however deals with the exact opposite of the facts in this case. In *Mullaney,* the defendant owned the house and the defendant's sister was living with the defendant. After arresting Mullaney on the porch of the house, the police went inside and knocked on a bedroom door, the sister, who was a guest in Mullaney's home, consented to a search of the home. The Court of Appeals held that the guest could only consent to a search of her own room and the common areas. *Mullaney* does not hold, as defendant claims, that adult siblings can not give consent to search another siblings bedroom. Mullaney, as the homeowner, would be able to give consent to a search of the whole house, just as Lewis could in this case.

Defendant cites two cases in which a parent was held to have authority to allow a search of an adult son's bedroom, but defendant claims that both cases are distinguishable because they involved a parent and child relationship and not a sibling relationship. That distinction makes no sense. If one sibling owns the home and has access to all the rooms then a guest, even a sibling guest, has a limited expectation of privacy in the room. In *People v Goforth,*[53] the adult son paid

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[51]6/28, 23.

[52]*People v Mullaney*, 104 Mich App 787 (1981).

[53]*People v Goforth*, 222 Mich App 306 (1997).

rent to his parents and had a keep out sign on the door and still the Court of Appeals held that his parents could give a valid consent for the search of his room. In *United States v Austin*,[54] the Sixth Circuit upheld a search based on parental consent for the room of a 25-year-old son who was paying rent and living on the third floor of his parents home.

In addition, the police could have validly entered the premises to arrest defendant under an exigent circumstances exception to the warrant requirement. The police were pursuing a murderer, he was known to be armed, the probable cause was strong, the likelihood that he would wash his hands and destroy the evidence of gunshot residue was high, the police knew he was in the residence, he had told the eyewitness he was determined not to go back to prison, and the entry into the home was peaceful.[55]

Also, any error in admitting these two pieces of evidence were harmless because an eyewitness to the murder testified that defendant shot the victim, defendant's girlfriend testified that defendant confessed to her, the physical evidence corroborated the eyewitness's statement, and defendant gave several statements to the police denying that he committed the shooting and then one statement claiming that he did shoot the victim but it was in self-defense. The evidence against defendant was strong even without the gun or gunshot residue evidence.

Thus, defendant's arrest was not illegal because the police had probable cause to arrest him and valid consent to enter the premises where he was arrested. There were exigent circumstances

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[54] *United States v Austin*, 81 F3d 161 (CA 6, 1996).

[55] *People v Oliver*, 417 Mich 366, 384 (1983); *Dorman v United States*, 140 US App DC 313, 320-321 (1970).

to enter the house even if consent had not been given and even if the arrest been illegal, any error was harmless because the evidence against defendant was especially strong.

RELIEF

WHEREFORE, this Court should deny Defendant's application fo leave to appeal.

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